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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5193

NAOMI RODRIGUEZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Appellants

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, RALPH and CHRISTIANE GOLDBERG; GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

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INDEX

	Page
Argument	1
1. A substantial number of voluntarily placed children return home after one year in foster care. Most of these children were not placed because of abandonment or neglect, and the clear intent of the New York legislature is for foster care to be a transitional measure, --an intent thwarted by the Judgment below.	2
2. Existing procedures available to foster parents provide prior judicial review of the proposed move of a foster child, in which the child may be separately represented.	5
Conclusion	7

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ARGUMENT

Appellees in their Motion to Affirm have not addressed any of the arguments made in Appellants' Jurisdictional Statement. Indeed the question of the rights of parents of voluntarily placed children to have their children returned to them with agency consent is not discussed at all. Appellees' presentation is based entirely on the case of Mrs. Smith, which did not involve the possible return of children home to their parents. An impression is sought to be created by Appellees that very few children are returned to their parents after one year, that most

of the children are neglected and abandoned (p. 11) and that the rights of the children's parents can be ignored. From those assertions, which are clearly not supported by the record, Appellees urge that conceptions of foster care as a temporary measure should be abandoned and instead foster care be treated as a permanent arrangement, without, however, any obligation on the part of the foster parent to make a permanent personal and financial commitment to a child through adoption.* Appellees also mislead when they assert that the procedure provided by 18 N.Y.C.R.R. 450.10 was the only one available to Mrs. Smith and other foster parents for prior review of the proposed move of a foster child.

1. A substantial number of voluntarily placed children return home after one year in foster care. Most of these children were not placed because of abandonment or neglect, and the clear intent of the New York Legislature is for foster care to be a transitional measure, --an intent thwarted by the Judgment below.

The five year study of children in foster care conducted from 1966 to 1971 by Professor David Fanshel and noted by the district Court** showed that 37% of the children, out of the 624 children studied, were discharged to their parents after the first year of placement; 24% had been discharged during the first year.

A subsequent report published by Professor Fanshel for Child Welfare Information Services, Inc., *** shows that in

* Neither Appellees Goldberg or Lhotan sought to adopt (T 135; State ex rel Wallace v. Lhotan, 51 A.D. 2d 252 (2d Dept. 1976). Appellee Smith could have initiated steps for permission to adopt the Gandy children in the SSL §392 proceeding to which she was a party in April 1974. See page 5 , infra.

** Joint Appendix p. 18a, fn. 5

*** Child Welfare Information Services, Inc. is the computerized information system for foster care in New York City established by the City and the voluntary child care agencies.

New York City alone 49.2% (1,343) of all children discharged from foster care after a stay of more than a year during the period June 1974 - May 1975, were returning to their parents. The Tables are annexed hereto as Exhibit A. Similarly, for the period January 1975 to December 1975, again in New York City alone, 48%(1,586) of children were discharged home from foster care after a stay of more than a year. These Tables are annexed as Exhibit B. Accordingly, the hearing requirement imposed by the district Court will in fact obstruct the return of a large number of children from foster care to their parents. Further, Appellants have never been able to follow Appellees' reasoning that because a few children go home after one year, the return of even those few should be impeded.

Appellees similarly misinterpreted the record when they assert that most children are placed in foster care because of neglect and abandonment. This assertion is false. According to the testimony of Robert Catalano,* who compiled Report #56 for the State Department of Social Services, the Report lumped its statistics for children who have been adjudged neglected or abandoned together with those for voluntarily placed children who are "dependent." Social Services Law §371.7 defines dependent child as "one in the custody of or wholly or partly maintained by an authorized agency or an institution, society or organization or charitable eleemosynary, correctional or reformatory character." The reasons why "dependent" children are admitted to foster care cannot be determined from Report #56. In fact, most children in voluntary foster care placement are there because ofphysical and mental illness, marital breakup, out of wedlock births, need for special education or treatment for the child, financial difficulties and "all kinds of problems of survival of generally poor and minority people."**

* Catalano 4/14/75 pp. 13-18.

** Fanshel 4/8/75 p. 14

The argument, in Appellees' Motion to Affirm, that foster care lasting longer than one year should be treated as the permanent arrangement as against the childrens parents,simply because children in New York experience prolonged stays in foster care, in effect seeks to institutionalize the worst feature of the New York foster care system as it has existed. This is clearly contrary to the intent of the New York Legislature, which has sought, since approximately 1970, to reform the New York foster care system by facilitating either the return of children home to their parents or adoption.* To achieve these goals, every session of the Legislature since 1970 has produced major changes in the laws governing foster care; enactment of Social Services Law §§392, 384-a, 358-a, Family Court Act §262 and amendment of Social Services Law §§383, 384 and Family Court Act §611, et seq. Social Services Law §§384-a and 392 in particular are intended to avoid the prolonged retention of children in foster care. New rights for foster parents were also recognized, Social Services Law §392, 383, Family Court Act §262. However, the legislature has not placed a limit on the length of time a child may remain in foster care and return home with the agencies' consent. On the contrary, the agencies must now obtain a Court order if they refuse a parent's request to have the child returned, Social Services Law §384-a.** Appellees have not presented any serious reasons why New York's attempts to reform its foster care system and to facilitate the return of children to their parents should now be thwarted. At the same time Social Services Law §392 Proceedings as well as custody proceedings are available

* Only if more children are discharged from foster care can the old statistics for length of time in foster care change.

** Except where a parent asks for the child prior to the time agreed upon with the agency.

to foster parents for prior review of a decision to move a foster child.

2. Existing procedures available to foster parents provide prior judicial review of the proposed move of a foster child, in which the child may be separately represented.

Appellees are simply incorrect when they say that the 18 N.Y.C.R.R. 450.10 conference was the only prior review of the agency's decision to move the children available to Mrs. Smith and the other foster parents, (p. 6) and that Social Services Law §392 review, in particular, could not provide such relief. (p.16-17) All named foster parents in this action were parties to Social Services Law §392 proceedings concerning the foster children in their care, at the time this action was commenced.

With respect to the Gandy children, the agency postponed their removal from the foster home of Mrs. Smith because a Social Services Law §392 review hearing concerning these children had already been scheduled in the New York Family Court for April 24, 1976, with Mrs. Smith as a party.* On that date Mrs. Smith appeared and secured an adjournment from the Court so that she could retain counsel.** Mrs. Smith then secured the services of Ms. Lowry, who, however, instead of returning to Family Court, instituted this action and obtained a temporary restraining order against the removal of the Gandy children on the basis of an affidavit which did not reveal that a 392 proceeding was pending in Family Court. ***

In the case of Appellees Goldberg, Mrs. Goldberg testified that the only time the removal of Rafael Serrano from that foster

* Affidavit of Barbara Graber 5/28/74, submitted 1/10/75.

** Plaintiffs' Reply Memorandum, November, 1974, p. 26

*** Affidavit Marcia Robinson Lowry 5/9/74.

home was concretely discussed was by the Family Court Judge at a 392 review hearing; a 392 hearing in that case was in progress when she joined this action.* A 392 review had been held for the Wallace children in 1972, with the Lhotans as parties, and the Family Court had continuing jurisdiction pursuant to Social Services Law §392 (10).**

Either in the 392 proceeding or by initiating an independent custody proceeding, pursuant to Family Court Act §651,Mrs. Smith as well as the other individual Appellees could by Order to Show Cause and Stay have secured a review of the proposed move of the foster children in their care, *** Matter of Dionisio R., 81 Misc. 2d 436, 366 N.Y.S. 2d 280 (Family Court New York County 1975); In re Custody of Mack, 81 Misc. 2d 802, 367 N.Y.S. 2d 644 (Family Court, Queens Co. 1975); Matter of Reed v. Daniels, 45 A.D. 2d 980 (App. Div. 4th Dept. 1974); Matter of Kurtis v. Ballou, 33 A.D. 2d 1034 (App. Div. 2nd Dept. 1970). In the Social Services Law §392 proceeding an indigent foster parent is even provided with assigned counsel, Family Court Act §262. Foster parents' right to resort to these remedies was not barred by the fact that children were in their physical custody, Hicks v. Bridges, 2 A.D. 335, 155 N.Y.S. 2d 746 (App. Div. 1st Dept., 1956); Application of Chin, 41 Misc. 2d 641, 246 N.Y.S. 2d 306, 41 Misc. 2d 650, 246 N.Y.S. 2d 316 (1963). In any custody proceeding the Trial Court has power to issue stays. Such a stay was issued even in In re W., 77 Misc. 2d 374, 355 N.Y.S. 2d 245 (Family Court, New York County, 1974) the only case relied on by the district Court in its discussion of Social Services Law §392 and custody proceedings.*

Further,in the 392 review the Family Court may assign a law guardian--independent counsel-for the child pursuant to Family Court Act §249,and in fact the Family Court usually does so in any contested 392 proceeding. See, for example, In re Spencer, 74 Misc. 2d 557, 346 N.Y.S. 2d 645 (Family Court, New York County 1973); Matter of Carla L., 45 A.D. 2d 375, 357 N.Y.S. 2d 987 (App. Div. 1st Dept. 1974); Matter of Dionisio R., supra; In re Zweibel, 79 Misc. 2d 366, 358 N.Y.S. 2d 795 (Family Court, Nassau County 1974); In the Matter of Mark H, 80 Misc. 2d 593, 363 N.Y.S. 2d 73 (Family Court, St. Lawrence Co., 1974); In re Janice K., 82 Misc. 2d 983, 372 N.Y.S. 2d 381 (Family Court, New York County, 1975). The provision for independent representation of children made by the district Court is in fact less than what is already provided under existing procedures.

In light of the availability of those judicial procedures, the creation of another parallel administrative procedure by the district Court was unnecessary. The procedure mandated by the district Court, in conflict with the provisions of Social Services Law §392, 384-a 383(1) and 383(3) will only create havoc in the operation of the New York foster care system.

CONCLUSION

FOR THE FOREGOING REASONS IN ADDITION TO THOSE CONTAINED IN APPELLANTS' JURISDICTIONAL STATEMENT, IT IS RESPECTFULLY REQUESTED THAT APPELLEES' MOTION TO AFFIRM BE DENIED AND THAT THIS COURT NOTE PROBABLE JURISDICTION AND GRANT PLENARY CONSIDERATION TO THE INSTANT APPEAL.

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* T 134-135, 139-141, Affidavit of Louise Gruner Gans, 10/25/74.

** T 161-162

***With respect to the younger Wallace girls, the Lhotans may have been limited to the 392 review, since those two girls had been in that foster home for under 2 years. (SSL §383(3)).

*Joint Appendix p. 14a; fn 15 p. 20a.

Dated: New York, New York
September 17, 1976

Respectfully submitted

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200 MADISON AVENUE, NEW YORK, N.Y. 10016

CWIS

COMPUTERIZED DATA FOR CHILDREN IN FOSTER CARE:

First Analyses from a Management Information Service in New York City

o

DAVID FANSHEL and JOHN GRUNDY

COLUMBIA UNIVERSITY SCHOOL OF SOCIAL WORK

EXHIBIT "A"

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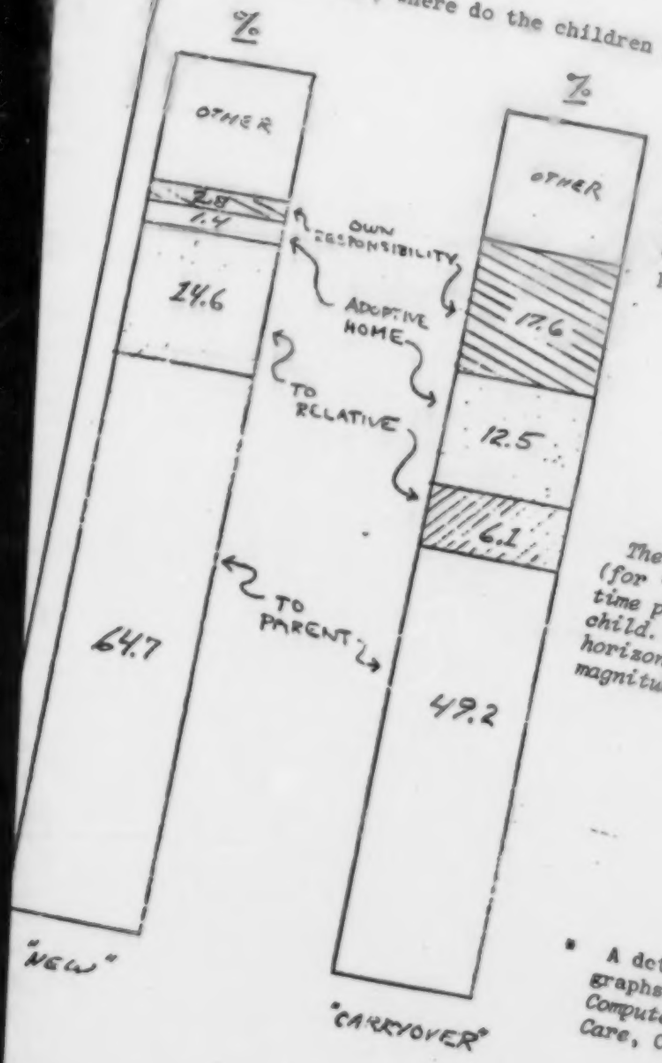
CWIS REPRODUCIBLE

There is much interest in the child care community as to how children leave care -- where do they go, and is that destination consonant with the plan for the child?

CWIS data analyzed by David Fanshel and John Grundy sheds some light on these questions.

First of all, where do the children go?



The graphs* to the left indicate the discharge destinations of children discharged between June 1, 1974 and May 31, 1975.

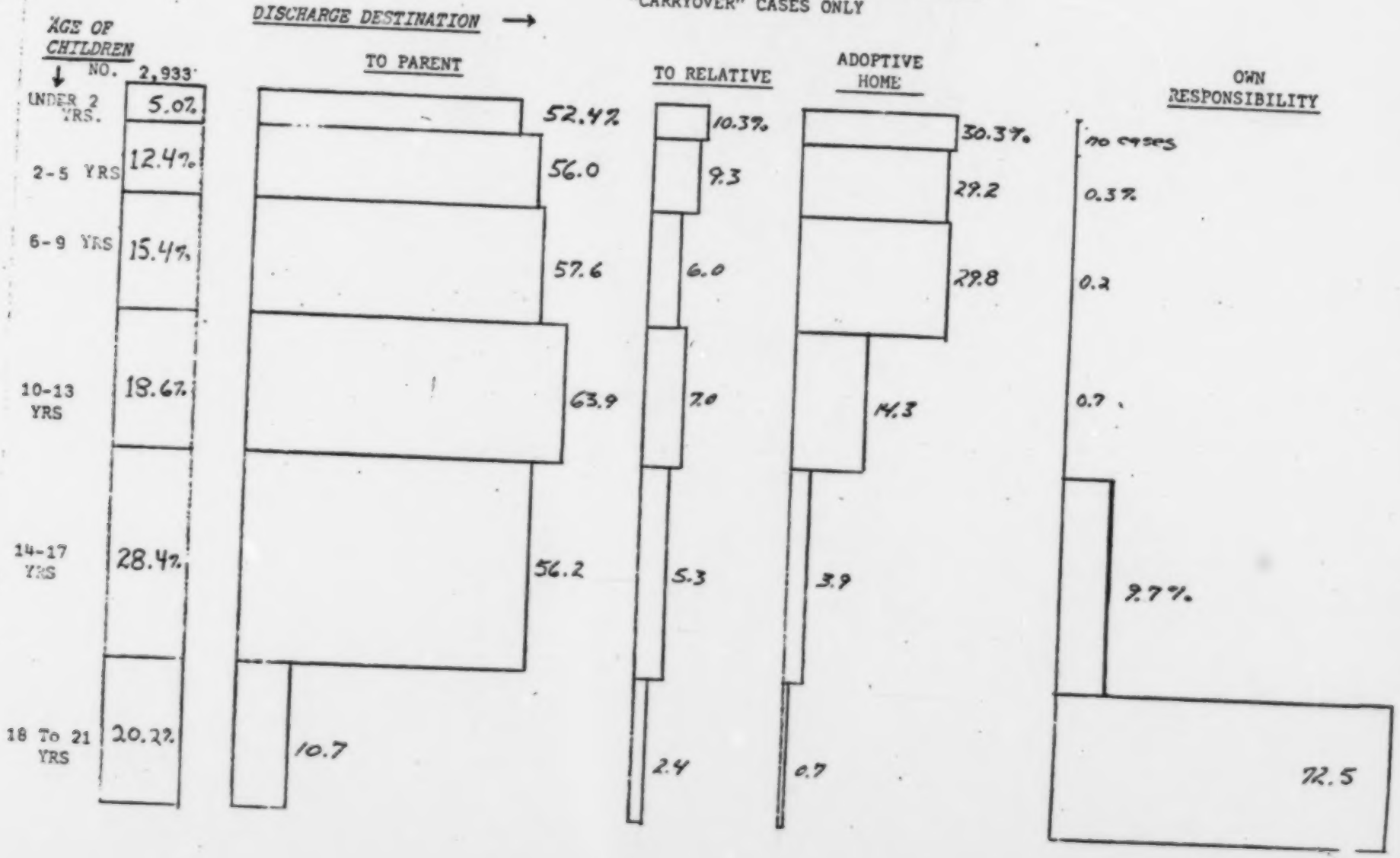
"New" arrivals are children who entered care during the period referenced above. "Carry-over" cases are those who were already in care prior to June 1, 1974.

The display on the following page indicates (for "carry-over" cases only, during the same time period) where children went by age of child. (The chart is proportionately spaced horizontally and vertically, to indicate magnitude).

* A detailed table supporting these graphs can be found in: Fanshel & Grunay, *Computerized Data for Children in Foster Care*, CWIS, New York, 1975, p.43.

BEST COPY AVAILABLE

DESTINATION OF CHILDREN DISCHARGED - BY AGE
"CARRYOVER" CASES ONLY



CWIS inc

CHILD WELFARE INFORMATION SERVICES, INC.

SYSTEM LEVEL REPORTS

DECEMBER 31, 1975

EXHIBIT "B"

PREPARED BY:
DAVID FANSHEL AND JOHN F. GRUNDY
RESEARCH AND DEMONSTRATION CENTER
COLUMBIA UNIVERSITY SCHOOL OF SOCIAL WORK
622 WEST 113TH STREET
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TO THOSE RECEIVING THE CWIS SYSTEM LEVEL REPORTS
FOR THE PERIOD ENDING DECEMBER 31, 1975

THE ATTACHED REPORT IS BASED ON DATA FROM 104 AGENCIES OR MAJOR AGENCY DIVISIONS CURRENTLY ON THE CWIS SYSTEM. CWIS NOW MAINTAINS RECORDS FOR 37457 CHILDREN. OF THESE 543 ARE CHILDREN WHO ARE NOT NEW YORK CITY CHARGES AND ARE EXCLUDED FROM SYSTEM LEVEL REPORTS. OF THE REMAINING 36914 CHILDREN 8833 HAVE BEEN DISCHARGED. DISCHARGED CHILDREN ARE INCLUDED IN THIS REPORT ONLY IN THE SECTION CONCERNING DISCHARGES AND ADMISSIONS. THE OTHER SECTIONS OF THIS REPORT INCLUDE 28081 CHILDREN CURRENTLY IN CARE OR ON SUSPENDED PAYMENT.

APPENDIX B1

Destination of Children Discharged During Period June 1, 1974 - May 31, 1975 For New Arrivals and Carry-Over Cases*

(Percentages)

Destination	New Arrivals	Carry-Over Cases
Parent	64.7	49.2
Relative	14.6	6.1
Free Adoptive Home: Foster Home	0.6	1.6
Free Adoptive Home: Other	0.7	2.5
Subsidized Adoptive Home: Foster Home	0.1	7.7
Subsidized Adoptive Home: Other	0.0	0.7
Self (Own responsibility)	2.8	17.6
Adult Mental Institution	0.0	0.1
Child Mental Institution	0.1	0.5
Penal Institution	0.4	0.5
Job Training	0.0	0.3
Military	0.0	1.1
Other	14.1	9.1
Don't Know	1.8	1.4
No Response	0.0	1.5
TOTAL	100.0	100.0
No. of Cases	679	2,742

*New arrivals are cases of children who entered care during the period June 1, 1974 to May 31, 1975. Carry-over cases represent children who were already in care prior to June 1, 1974.

TABLE 53
DISCHARGE DESTINATION BY ADMISSION DATE OF CHILDREN
DISCHARGED BETWEEN 1- 1-75 AND 12-31-75
(N= 4292)

DATE OF ADMISSION:	ADMITTED AFTER 12-31-74	ADMITTED BEFORE 1- 1-75
DISCHARGE DESTINATION:	%	%
RETURN TO NATURAL PARENT	70.1	48.1
RELEASED TO RELATIVE	13.9	6.1
FREE ADOPT-FOSTER FAMILY	-0.0	2.5
FREE ADOPTION-OTHER	0.4	2.6
SUBS.ADOPT-FOSTER FAMILY	-0.0	11.3
SUBSIDIZED ADOPT-OTHER	-0.0	0.8
REL. TO OWN RESPSIBILITY	2.8	18.1
ADULT MENTAL INSTITUTION	0.1	0.2
CHILD MENTAL INSTITUTION	0.5	0.2
PENAL/CORRECTIVE INST.	0.2	0.4
ENTER ADULT JOB TRAINING	-0.0	0.2
TO ENTER MILITARY	-0.0	1.0
OTHER	9.8	7.1
UNKNOWN	1.4	1.1
NOT REPORTED	0.7	0.5
TOTAL:		
PERCENT	100.0	100.0
NUMBER OF CASES	988	3304

A "-).0" PERCENT INDICATES THERE ARE NO CASES IN THAT SUB-CATEC
ROWS AND COLUMNS WITH NO CASES ARE OMITTED FROM THE TABLE.
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REPLY Y